Supreme Court, U.S.
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No. 92-438

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1992

THE DOW CHEMICAL COMPANY, *et al.*,
Petitioner,

v.

CHARLES BROWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES BROWN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 7, 1992

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QUESTIONS PRESENTED

If the writ of certiorari were granted, Respondents would add the following questions to those presented by the Petition, as alternative grounds for upholding the Court of Appeals' denial of review:

I) Whether the Court of Appeals was justified in denying a discretionary appeal that would rely upon an amendment to Petitioners' Notice of Removal that was improper under 28 U.S.C. § 1653, as a clearly out of time amendment of substance;

II) Whether the district court erred in holding that a corporation may remove under § 1442;

III) Whether the district court erred in removing claims of veterans' in Ryan, the case to which the civilians were supposedly "pendent" parties;

The Petition also inherently raises the following question as to award of attorney fees:

IV) Whether attorney fees should be awarded against Petitioners under 28 U.S.C. § 1446(a) and F.R.Civ.P., Rule 11, under § 1447(c), and as "terms" under § 1653, where Petitioners have 1) defended a frivolous § 1441 Notice of Removal for 18 months, before filing a late amendment to that Notice introducing entirely new grounds for removal under § 1442; 2) made multiple attempts to appeal a non-appealable order that rejected all grounds Petitioners alleged to support federal jurisdiction; and 3) sought a writ of certiorari to review the non-reviewable discretionary denial by the Court of Appeals of a 28 U.S.C. § 1292(b) appeal of a § 1447(c) remand order that itself, under all existing authority, is "not reviewable on appeal or otherwise." § 1447(d).

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STATEMENT OF THE CASE

In 1989, Texas citizens and others filed tort claims in Texas state court pleaded exclusively under state law. Plaintiffs, Respondents here, included both civilians and military veterans of the war in Vietnam. They sought relief for injuries incurred as a result of their exposure there to dioxin contaminants contained in the various herbicides produced by defendants. Shirley Ivy, et al. v. Diamond Shamrock Chemicals Co., et al., No. A890389C, (128th Dist. Texas) ("Ivy"). Because of the twenty year or more latency period for the serious diseases caused by dioxin, these plaintiffs' injuries had neither occurred nor been discovered, and their claims had not yet arisen under state law, at any time prior to May 7 1984, at the earliest.

The defendants, including a Texas corporation, Petitioners here, filed a Notice of Removal in June 1989 under 28 U.S.C. § 1441, seeking removal of a notional "federal question" in Ivy to the U.S. District Court for the Eastern District of Texas. Defendants asserted such a removable federal question on the basis of an alleged (but unpleaded) federal defense, in direct violation of the "well-pleaded" complaint rule.

Defendants at the same time sought multidistrict litigation ("MDL") transfer of Ivy from the Eastern District of Texas to the Eastern District of New York. Before the MDL Panel, plaintiffs challenged the jurisdiction of the federal courts to make an MDL transfer where federal jurisdiction was obviously lacking under existing law, and also where no case was pending pretrial in a different

district as required by the transfer statute, 28 U.S.C. § 1407(a). But the Court of Appeals held, for the first time, that neither the MDL panel nor the Court of Appeals reviewing an MDL transfer order had authority to determine its own jurisdiction. Ivy v. Diamond Shamrock Chemical Co., 901 F.2d 7 (2d Cir. 1990). The Court allowed a transfer to Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York under a newly created "inherent" judicial power to determine federal jurisdiction. See id. at 9.

Plaintiffs filed their Motion for Remand in the U.S. District Court for the Eastern District of New York on October 25, 1990. After long delays requested by defendants, the remand motion was fully briefed, and then argued by plaintiffs on March 6, 1991, after which the district

court allowed the defendants even further delays, enabling them to file a motion to amend their 1989 Notice of Removal. Defendants' April 23, 1991 amendment, being almost two years late, violated the 30 day limit on filing such notices. See 28 U.S.C. § 1446(b). This late amendment, sought to present for the first time the § 1442(a)(1) removal claim upon which defendants now seek appellate review.

Subsequently the district court also allowed defendant, both before and after judgment, to supplement the record with massive attempted proofs of the claim, advanced in the Amended Notice of Removal, that Petitioners were persons acting under a federal official in their production of dioxin-contaminated herbicide. Plaintiffs opposed this claim with their own evidence of contrary facts.

The district court issued several

rulings on Mrs. Ivy's motion to remand. It held that the military veterans' claims could be removed from state court, though there was admittedly no independent ground for jurisdiction, by reason of either diversity or federal question. Ivy v. Diamond Shamrock, 781 F. Supp. 902 (E.D.N.Y. 1991). A86, A90. The court found that it had predetermined the res judicata effect of its own previous order adopting a 1984 class action settlement of a diversity case in Ryan v. Dow Chemical, 618 F.Supp. 623 (E.D.N.Y 1985), aff'd 818 F.2d 145, 151 (2d Cir. 1987), cert. denied 484 U.S. 1004 (1988). The Ryan plaintiffs had raised claims similar to those in Ivy, but had settled those claims for "nuisance value" on May 7, 1984 before the Ivy claims arose. Petition ("Pet.") 4; see A94, A97.

In an uprecedented ruling the

district court held that its predetermination of the preclusive effect of the Ryan settlement provided it with federal jurisdiction to remove a case of a putative absent class member whose state tort claim had not yet even arisen at the time of the 1984 settlement. See A87-99. The Ivy plaintiffs after first seeking rehearing, see Memorandum of Law, Toxic Chemicals Litigation Reporter 14,986 (November 14, 1991), appealed this ruling to the U.S. Court of Appeals for the Second Circuit where it is awaiting oral argument.

As to the civilian plaintiffs, who are Respondents here, the district court found that removal was improper, since they were not even arguably party to the class action settlement. The district court thus concluded that the civilian cases must be remanded for "lack of

subject matter jurisdiction." See Memorandum, Order, and Judgment of Dismissal, Ivy v. Diamond Shamrock Chemicals Co., No. 89-3361, (E.D.N.Y. October 4, 1991), at 4, 46, Toxic Chemicals Litigation Reporter 14,839, 14840, 14861 (October 10, 1991) ("Order"); cf. A61, A81, A101. The court severed these claims, A86, and then reaffirmed its remand order, notwithstanding defendants' argument, on rehearing, claiming that the civilian claims could be removed under § 1442. See Ryan v. Dow Chemical, 781 F. Supp. 934 (E.D.N.Y. 1991) (civilian claims) reh'g granted, No. 89-3361, (E.D.N.Y. February 7, 1992), modified and aff'd. (March 30, 1992), appeal denied, No. 92-8008 (2d Cir. May 8, 1992)(mem.) reh'g denied, (June 8, 1992)(mem.) appeal dismissed, No. 92-7487 (2d Cir. June 16, 1992), appeal withdrawn No. 92-7615 (July

28, 1992)(mem.) petition for cert. filed sub nom. Dow Chem. Co. v. Brown (U.S. September 8, 1992)(No. 92-438)("Brown").

The district court's opinion in the Brown case, id., explained the reasons for the remand. This opinion accepted defendants' argument that cases such as International Primate Protection League v. Administrators of Tulane Educational Fund, __ U.S.__, 111 S.Ct. 1700 (May 20, 1991) and Roche v. American Red Cross, 680 F. Supp. 449 (D.Mass. 1988), which have limited § 1442(a)(1) removal to natural persons, should not be followed to preclude these corporate defendants from invoking the "federal officer" removal statute. A39.

The district court's opinion also adopted a novel analysis allowing the late amendment of the removal notice. Although the amendment admittedly added new

substantive allegations on a claim not mentioned in the removal notice, the court first found these allegations were hinted at by a defense, which related in some fashion to the factual grounds needed to support the late removal claim, which the court found the defendants intended to -- though they did not actually -- plead in their answer. The court then held there was "sufficient evidence before the court," in the file of a previous case, about the facts concerning this defense that were similar to the facts underlying the § 1442 claim. A23-27. Accordingly, though defendants had neither sought a § 1442(a) removal nor provided any facts to support such a claim in their 1989 Notice of Removal, through a notion permitting "notice" based on such clues, the court found the late amendment acceptable because the court itself from its

experience in another case could intuit and furnish all the essential but missing elements for a valid notice of removal under § 1442(a).

Notwithstanding these rulings, the district court confirmed its remand of the Brown case. It held that defendants' massive attempted proofs had failed to show "[t]he necessary direct and detailed official control over the acts for which the defendants are now being sued," 781 F.Supp. at 950-51, so as to support federal officer removal under § 1442.

The district court then certified its decision to remand the civilians' case for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). Defendants petitioned the Court of Appeals for permission to appeal under § 1292(b), and also filed a notice of appeal, presumably invoking the collateral order doctrine. The Court of

Appeals denied the petition for interlocutory appeal, and dismissed the collateral order appeal, apparently indicating at oral argument that no petition for mandamus would be entertained either. As a result, all of Petitioners' theories for appeal were rejected by the Court of Appeals.

SUMMARY OF ARGUMENT

Respondent Charles Brown opposes the Petition for Writ of Certiorari. Though the underlying case is profoundly significant to him and others, and relates to an important chapter of American history, the precise procedural issue at stake here is not of great moment. The precise issue presented has never arisen before and is not likely to recur often. There is no division among the Circuits on any dispositive issue raised by the Petition. The underlying appeal is of

little jurisprudential importance because it seeks no more than a second opinion on the trial court's findings of fact, and can affect nothing more than the forum where Mr. Brown's claims may be tried.

Petitioners seem for the most part to seek advisory opinions from this Court on potentially conflicting theories primarily of their own creation. But these theories had no bearing on the outcome of the case below, which did not theorize, but rather summarily applied a well known rule to uncomplicated facts so as to deny a discretionary appeal.

The uncontroversial rule which has been in place through most of our constitutional history holds that a remand to state court for lack of federal subject matter jurisdiction is not appealable. The trial court undeniably remanded for that reason, under 28 U.S.C. § 1447(c), on

account of defendants' inability to prove facts necessary for removal by federal officers under § 1442, see A54, A57, or any other provision.

Petitioners posit that a party whose separate claims lacked any basis for federal jurisdiction when removed in 1989 was nevertheless properly removed as "pendent" to other parties until the time of a "discretionary" severance and remand. Pet. 12. If this were true, defendants would claim, the remand must have been other than under the non-discretionary remand provision, § 1447(c). But Petitioners cite no authority whatsoever for their theory, which directly contradicts this Court's opinion in Finley v. United States, 490 U.S. 545 (1989). That case foreclosed any "pendent party" jurisdiction and made remand of such parties mandatory, not discretionary.

Petitioners also seek to restrict § 1447(c) remands by giving to the statutory term "case" a restrictive interpretation that would exclude its application to all of the claims of a single co-plaintiff. Petitioners would use the term only to denote all claims of all parties in an action. But Petitioners can find no precedent to support this definition, let alone a division in the Circuits. The definition is too restrictive and defies the flexible, general usage of the term "case" in a variety of contexts.

In the ordinary meaning of the term, Charles Brown had a "case" in 1989 that required remand under § 1447(c) from the time it was removed, even if it had been joined with the "cases" of other plaintiffs whose claims could be removed. Therefore the order remanding his case is non-appealable under § 1447(d).

Every Circuit Court allowing appellate review of a remand order has limited that review to situations where the district court's basis for remand was not founded in the statutory grounds contained in § 1447(c). Petitioners' attempt to justify their appeal by bringing it within the class of cases that are remanded on grounds other than § 1447 fails, because it is not grounded in fact or law. No court, other than perhaps the district court below, has held that § 1292(b) is not just the means for taking an appeal of a remand order not prohibited by § 1447(d), but itself would qualify and delimit the scope of § 1447(d).

Defendants' proposed rule for reconciling a conflict they perceive between these two statutes, which no other court has ever found, is that a § 1292(b) appeal of a remand order should be per-

mitted either when the order is stayed or when appeal would prevent delay. There is authority neither for the former, a purely verbal formula for judicial repeal of the statute, nor for the latter, which is inapplicable to this case in any event. Trial of this case would only be delayed further by an appeal of the jurisdiction issue, precisely what Congress sought to avoid by maintaining the equivalent of § 1447(d) on the books for most of two centuries.

Petitioners attempt to argue, as they must, that there is a division of the Circuits on these issues. But with the exception of the district court below as to one issue, no single Court has ever even addressed these issues and theories that Petitioners now raise to challenge the Second Circuit's decision, and on which Petitioners seek Supreme Court

review. In order to furnish some semblance of conflict to warrant grant of the writ, therefore, Petitioners present an argument that there is conflict over the means for raising the question of reviewability of a remand order in the Courts of Appeals. Nct only is this an issue of little note, but it would not affect the outcome of this case however it is resolved because the Second Circuit denied all avenues of review.

On this and other issues the Petition seeks an advisory opinion from this Court on matters of intellectual interest that are neither significant for the administration of the federal courts, nor dispositive of the ruling by the Court of Appeals. Because the appeal defendants seek is one for reassessment of their massive factual evidence which failed to persuade the trial judge that they were

working under a federal officer in committing the act complained of, denial of an appeal will have no measurable consequence for future cases.

Advocating a new set of rules for reviewability that no court has ever mentioned or adopted, Petitioners suggest that the "importance" of its factual issue warrants § 1292(b) appeal. But the Court of Appeals' exercise of discretion under § 1292(b) is not subject to review. If this Court were to review the Court of Appeals' exercise of its discretion to reject a § 1292(b) appeal, it would also have to consider the alternative bases for upholding its decision set forth in the respondents' statement of Questions Presented.

This Court has authority under § 1447 to award, or to direct the lower courts to award attorney fees on account of expenses unnecessarily incurred by plaintiff in

opposing defendants' attempts to appeal a non-appealable order. Such an award would be consistent with the purpose of the statute and deter future abuses.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied on each of the three questions presented by Petitioners for the reasons stated below.

I. PETITIONERS' QUESTION I RELIES ON A NOVEL DEFINITION OF A "CASE" NEVER ADOPTED BY ANY COURT, AS WELl AS A THEORY OF "PENDENT PARTY" JURISDICTION REPUDIATED BY THIS COURT, AND IGNORES THE ACTUAL BASIS FOR THE DISTRICT COURT'S DECISION

In its several statements of its first question presented, the Petition carefully avoids asserting that the Court of Appeals actually committed error in this case by denying defendants permission for a § 1292(b) interlocutory appeal of an order remanding this case for lack of any "basis for federal subject matter

jurisdiction." A57. Instead, Petitioners complain of possible conflicts between other courts on other issues, and ask "whether there is appellate jurisdiction to review" this case in the abstract. Pet. 7. However certiorari will not be granted to determine whether the Court of Appeals' could have accorded review under § 1292(b), if it had chosen to do so.

Thermtron Products v. Hermansdorfer, 423 U.S. 336, 343 (1976), provides a complete and absolute prohibition of any appeal from a remand order grounded exclusively in § 1447(c), but left open the possibility of review, by mandamus, of remand orders based on other grounds. Decisions from different Circuits have applied this rule to different factual circumstances. These cases have generated some legal arcana of some intellectual interest, but without much controversy or

importance in the overall administration of the federal courts.

Petitioners seek to create a conflict between these decisions and what the "Second Circuit apparently thought," Pet. 9, when it summarily denied appeal of the remand order in this case, citing Thermtron. But Petitioners are unable to cite any case that is inconsistent with the result of the Second Circuit's summary denial and dismissal of defendants' appeal of a § 1447(c) remand order, the only basis on which plaintiffs had moved for remand. See A54. Thus there is no division in the Circuits on Petitioners' Question I, because each case cited by defendants presents a different set of facts from this case. Even the theoretical analysis of rules that defendants essay for purposes of creating a conflict with what the "Second Circuit apparently thought"

finds no support in the cases.

Petitioners start their argument from the premise that federal jurisdiction depends upon the state of the facts at the time of removal, Pet. 10. They then contend that the severance of Mr. Brown from his co-plaintiffs was "equivalent for jurisdictional purposes to the substitution of parties ... and the withdrawal of federal claims" which other Courts have held to change the factual basis for jurisdiction after removal. Therefore, Petitioners conclude, the Ivy "case" including Brown's claims can be deemed removable up to the point of severance. By this verbal formula parties with claims that cannot be removed, could be remanded under some provision other than § 1447(c), which permits remand solely of a "case" improperly removed. There are several problems with this argument.

First, Petitioners' contention that "the court had jurisdiction over the entire case, including the pendent civilian respondents," Pet. 12 (emphasis added), is unsupported by authority. Petitioners rely on cases such as Carnegie Mellon, Pet. 10-12, which permits discretionary remand, and hence review of the remand, of a party's pendent claims. But Petitioners carefully avoid comparing those cases to the cases asserting jurisdiction over a pendent party.

While non-removable state claims of a party may be removed as pendent to that party's removable claims, parties having no removable claims could not be removed as pendent to other parties who did have removable claims. Finley v. United States, 490 U.S. 545 (1989). Therefore at the time of removal, Mr. Brown and his

claims, whether denominated a "case," "action," "suit," or otherwise, were not removable and required remand if they were removed. The Brown case was therefore properly remanded under § 1447, and not under any discretionary power to remand a "pendent" party.

Petitioners claim that remand was ordered "[o]nly after a discretionary ... severance." But in fact the district court ordered the case remanded in October, ordered severance in November, and, after reargument, published its opinion explaining the reasons for these rulings in January. The severance was not a discretionary condition precedent to the remand but an inevitable result of the mandatory remand order.

Even if there had been a "pendent party" basis for jurisdiction over Mr. Brown, which there was not, defendants

waived this hypothetical ground for making Mr. Brown's claim removable in 1989 by failing to raise the issue in their 1989 Notice of Removal within 30 days of receiving the complaint. § 1446(b). No mention of a "pendent party" basis for removal of civilian claims is found in the original notice, nor even in the late 1991 Amended Notice of Removal, nor in any of defendants' numerous briefs or arguments in various hearings and rehearings on the issue below. This ground for removal, now argued for the first time, was waived if it had ever existed.

Indeed, in 1989, the Notice of Removal stated no grounds upon which the civilian claims could be removed at all, whether "pendent party" or any other basis. Therefore they were not removable at all in 1989 under any circumstances, consistent with § 1446. There being no

"pendent party" basis for federal jurisdiction available or claimed at the time of removal, the severance of Mr. Brown's claim from the other parties' claims did not affect federal jurisdiction over his case in any way.

Second, Petitioners' definition of the statutory term "case" to mean "entire case" is too precious. Petitioners cite no authority for so defining a "case" that shall be remanded under § 1447(d) to exclude reference to all claims of a single party joined with other parties in one action. The term "case" is a flexible one that can easily bear this meaning, and also include all the claims of all parties in an action, as Petitioners contend. "Case," like "action," is a general term that cannot be rigidly hedged into the single narrow meaning Petitioners seek, while excluding other possible meanings.

Both words "might mean one thing for one purpose and something different for another." United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933).

In the ordinary meaning of the word, Mr. Brown's "case" was permissively joined with Mrs. Ivy's and others for filing in 1989. Mr. Brown's "case" was removed in 1989, when, lacking any legal authority for "pendent party" jurisdiction, each plaintiff had to have, from the outset, some independent jurisdictional bottom for any federal subject matter jurisdiction that might be asserted over them. Since this Court expressly precluded any such thing as "pendent party" jurisdiction, Finley v. United States, supra; see Zahn v. International Paper, 414 U.S. 291, 301 (1973)(diversity), there was no ground for

removing Brown in 1989. 1/ Upon motion to remand, or whenever "it appears that the district court lacks subject matter jurisdiction," § 1447(c), the federal court had no discretion but to sever and remand. In the terms of the statue, "the case shall be remanded."

Petitioners' "entire case" removal argument also depends upon the assumption that removal of the veterans' cases was proper in 1989. That issue is presently on appeal. It would be inappropriate for this Court to reach Petitioners' argument, that the remand of Brown's case is appealable because his case was removable in 1989 as "pendent" to a removable "entire case," unless it first accepts the

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1/ Although Finley was overruled in part by Congress in 1990, when it enacted 28 U.S.C. § 1367, that enactment can have no application to this case. It applies only to cases commenced after November 30, 1990. Pub. L. No. 101-650, § 310(c).

premise that the removal of the veterans was itself proper at that time. Otherwise the "entire case" was improperly removed as plaintiffs have consistently contended. Though plaintiffs are not submitting with this opposition their 100 page Brief for Mrs. Ivy et al., filed in the Second Circuit, showing the total absence of any authority to support the removal of the veterans' cases, these issues would need to be litigated in this Court if Petitioners were allowed to premise the reviewability of the remand of Mr. Brown's claims on a "pendent party" theory.

II. THERE IS NO CONFLICT WITH ANY CIRCUIT ON THE SUPPOSED NEED TO RECONCILE 28 U.S.C. § 1447(d) AND 28 U.S.C. § 1292(b), AND PETITIONERS' RECOMMENDED RESOLUTION OF THE ALLEGED CONFLICT -- A PREVENTION OF DELAY TEST -- WOULD NOT REQUIRE REVERSAL OF THE RULING BELOW

Petitioners invite this court to explore the "apparent conflict between §

1292(b) and § 1447(d)." Pet. 20. The latter statute prohibits review of a remand order "on appeal or otherwise" and would therefore apply equally to a § 1292(b) interlocutory appeal as it would to a § 1291 collateral order appeal, or even a § 1651 mandamus action.

Remand orders have traditionally been non-appealable because they lack finality. E.g. Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. Roberts, 141 U.S. 690 (1891); Railroad Co. v. Wiswell, 90 U.S. (23 Wall) 507 (1875). Some Courts of Appeals have ruled, however, that the narrow class of remands that are made on grounds other than § 1447(c), such as under a contractual forum selection clause, may avoid this rule and be appealed as collateral or interlocutory orders, in addition to the mandamus route approved in Thermtron.

In an appropriate case the Second Circuit may well also review such a remand order. The denial of review for which the writ is sought here, however, simply found that Brown was not that appropriate case. As discussed above, defendants cite not a single precedent for holding a remand order appealable under the circumstances of this case. Moreover, a variety of arguments, in addition to those stated in the Thermtron opinion, would support the Second Circuit's discretionary decision to deny a § 1292(b) appeal. Whether or not an advisory opinion by this Court may be useful in reconciling any conflict that might be imagined in the context of a different case, there is no conflict between § 1447(c) and § 1292(b) as applied in this case. Both statutes support the denial of appellate review of the order remanding Mr. Brown's case to state court.

Petitioners seem to suggest, taking their lead from the district court, that in every case where a district judge certifies a remand order for interlocutory appeal under § 1292(b), the certification should override § 1447(d)'s express prohibition of any kind of review, whether of a final or interlocutory nature. This proposed authority to overrule the express command of § 1447(d) would apparently be available if the district court chooses to stay its remand order. See Pet. 18; A56-57. Aside from the district judge's inventive opinion below, only one case is cited to support this proposition, In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991 cert. denied sub nom. Gumby v. General Pub. Util. Co., 112 S.Ct. 1962 (1992). Id.

In re TMI does not support such a rule. In re TMI expressly ruled that the

existence of the stay was not determinative of its decision. 940 F.2d at 847 n. 9. Instead, the Third Circuit in In re TMI painstakingly pointed out the unprecedented facts that did lead it to resolve the "unique" dilemma presented in that case by reviewing a remand order, aside from the fact that "the district court ... certifie[d] th[e] question." This reason was the lower "court's decision that the statute which purports to confer federal jurisdiction is unconstitutional." The court emphasized that its "ruling is a narrow one." Id. at 847, and that "[n]o case ... has addressed the particular constitutional dilemma presented," id. at 836.

In Thermtron, 423 U.S. at 351, this Court said,

> we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal

> statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

In re TMI thus interpreted Thermtron to make appealable a remand based partly on the constitutional grounds held to invalidate the removal statute itself, rather than solely under the statutory ground established by Congress in § 1447. To be non-appealable under § 1447(d), the Third Circuit held, "a remand order must be based upon a finding that removal was not authorized by Congress." Id. at 845. The Third Circuit reasoned that Congress had intended the district courts to be the final arbiters of whether Congress intended a case to be removable, but not whether the removal statutes enacted by Congress are themselves constitutional. See id. at 843.

Because they cannot argue that the

district court's remand in this case was based on any finding other than that removal was not authorized by Congress in § 1442(a), Petitioners' reliance on In re TMI is seriously misplaced. In re TMI held a remand order appealable for a reason that had never occurred before, as the Third Circuit observed, and may well never occur again. It has certainly not occurred in this case. The district court did not hold unconstitutional a statute otherwise permitting removal of the Brown case. The district court's decision did not even turn on a point of law.

Indeed this case presents the opposite situation where the district court removed Brown's co-plaintiffs' "cases on grounds that seem[ed] justifiable to [it] but which are not recognized by the controlling statute," 423 U.S. at 351, and are therefore now

under challenge by the Ivy plaintiffs in the Second Circuit. In Brown the district court simply refrained from revising the federal removal statutes, as it did in Ivy, and remanded, according to law, for lack of any "basis for federal subject matter jurisdiction" on the facts adduced by Petitioners. 781 F.Supp. at 953.

Petitioners try to invoke an analogy to In re TMI by neglecting to frankly state the "unique" reason the court gave for allowing an appeal in that case. The Petitioners would thus invite this Court to falsely analogize between a case involving "an unsettled question of constitutional proportion" concerning a jurisdictional statute and the alleged "importance" of Petitioners' substantive defenses in this case. Pet. at 17. But the question of fact which the district court resolved against Petitioners is

poles apart in "importance" from a constitutional question.

Respondents' alternative grounds to support the remand are far more significant, but are also largely of non-constitutional stature, and would not furnish support for the Petitioners' request that a writ be granted. Application of Petitioners' proposed "importance" rule would require an analysis of the alternative bases for supporting the Court of Appeals' denial of the § 1292(b) petition, such as that the factual issue in Brown was not "important," that the notice amendment was wrongly permitted, and that weaknesses in jurisdiction over the claims to which Petitioners argue Brown was a "pendent" party all made success unlikely on appeal. The Second Circuit has already held that claims such as Mr. Brown's implicate no

important federal interest. In re Agent Orange Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980), cert denied, 454 U.S. 1128 (1981).

On the basis of their false analogy to In re TMI, Petitioners would have Mr. Brown join the Ivy plaintiffs on appeal to "prevent delay" of his case. Pet. 20. The prevention of litigation delays is the test Petitioners recommend for reconciling the supposed conflict between § 1447(d) and § 1292(b), when issues sought to be appealed are "important." Id. But even if this Court were to accept Petitioners' proposed new rule that would allow certified appeals from "important" remand orders whenever appeal would "prevent delay," this rule would not assist Petitioners in this case.

In this case the district court has clearly ruled that the civilians were not

part of the original Agent Orange settlement. Since no issue going to the merits is at stake on appeal in Brown, the allowance of an appeal could achieve no more than to determine whether the Brown case will be tried in Brooklyn federal court or a Texas state court.

Petitioners would have Brown join the Ivy plaintiffs' effort to reverse the novel "res judicata removal" of their cases, so that the Court of Appeals can at the same time further refine the district court's factual analysis and perhaps change its § 1442 determination as to where Mr. Brown should properly try his state tort suit. It is clear that to prevent future delay, as well as to remedy past delays, in the manner that Congress intended § 1447(d) to accomplish, this Court would need to deny the writ with instructions to the Court of Appeals to

award attorneys fees under § 1447(c) for the serious, unwarranted delays in Brown which Petitioners' appeal of clearly non-appealable remand orders has caused.

The argument that a particular federal judge will try these cases more expeditiously than any state court, see Pet. 20, is a red herring. No judge, federal or state, has yet brought to trial any case alleging injuries from Agent Orange in Vietnam. Collateral estoppel is as effective as joint trials to reduce duplication of effort in a personal injury suit. Because of the different latency periods for manifestation of injury, and the geographical distribution of the plaintiffs, all such cases cannot be tried together in one court in any event.

III. ANY CONFLICT IN THE CIRCUITS AS TO THE PROPER "AVENUE" TO REVIEW REMAND ORDERS IS IRRELEVANT TO THIS CASE

Petitioners' Question III contends that there is a division in the Circuits

as to "the proper avenue for appellate review of remand orders." Pet. 21. But the several potential means for taking an appeal into the Circuit Courts is not a significant issue to occupy this Court's docket. This Court has secured one avenue for all Circuits, mandamus, while certain Circuits, under certain facts, have also permitted use of § 1291 or § 1292, as well. There is little reason for this Court to grant the writ to simply place its imprimatur on one such practice or another, which in any event is of greater administrative concern to the Circuits themselves, than it is to this Court.

Moreover whatever "avenue" of appeal this Court might endorse in addition to mandamus would be irrelevant to the outcome of this case. Petitioners advocate a § 1292(b) means for reviewing this case. Yet the Second Circuit denied appeal by <u>all</u> possible means, expressly

including § 1292(b). It did not select one means over another, nor did it refuse Petitioners' appeal on the ground that Petitioners selected the wrong route. Therefore, without sorting out the various cases cited by Petitioners to determine whether or not there is an actual conflict among the Circuits on this issue, it is clear that this is not the case to resolve any such potential "conflicts and uncertainties." Pet. 22.

Whichever such "avenue" this Court might endorse for presenting reviewable remand orders to a Circuit Court, that avenue was taken and the appeal was rejected by the Second Circuit. In view of the policy underlying the congressional mandate of § 1447(d), there was neither precedent nor any persuasive reason for the Second Circuit to hold the order remanding Charles Brown's case to state

court a usefully reviewable collateral or interlocutory order under § 1292(b). Whether or not it would be helpful to have an advisory opinion on this rather arcane question that seldom arises, it would not affect the outcome of this case and therefore cannot be a proper ground for invoking the jurisdiction of this Court.

IV. THIS COURT SHOULD PROVIDE FOR THE AWARD OF PLAINTIFFS' ATTORNEY FEES

The same statute which precludes appellate review of remand orders also provides for award of "attorney fees, incurred as a result of the removal." § 1447(c). In addition, another recent amendment, to § 1446(a), by its reference to F.R.Civ.P., Rule 11, underscores Congress' renewed intention that financial sanctions should be applied to defendants in appropriate remanded cases.

The expenses of defending against an

improper removal include defense of the remand order against an improper appeal. Appellate expenses, including those for this Opposition, may comprise a significant part of the total expenses resulting from an improper removal. The clear intent of Congress is to make attorney fees available against a defendant who improperly invokes the removal statute, thereby generating extensive litigation over forum selection, as this case has.

The intent to compensate the plaintiff who wins remand should be even more clear when the appeal of the remand order further aggravates the expense and delay, and also violates yet another section of the statute flatly prohibiting that appeal. In a case like this, where the differential resources available to the parties are lopsided in favor of the

removing defendants, and the proceedings have extended over more than three years, the statute should have special application to deter intentional abuse.

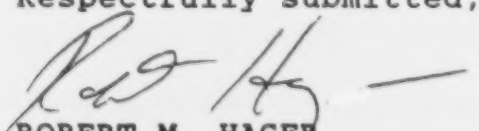
The district court refused to consider an award of sanctions, cf. A101, though its stay of the remand order and this appeal would seem to leave the question of fees open. See Southern and Eastern Districts of New York, Civil Rules, Rule 11. Cf. Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970). The added burden of appellate costs might change the district court's calculation. However this Court could effectively give meaning to the intent of Congress by expressly including in its denial of certiorari, or summary affirmance, a suggestion that an award of attorney fees should be taxed in the courts below. Failure to provide for the award

contemplated by Congress will deter plaintiffs from opposing the improper removal of state cases to federal court.

CONCLUSION

The petition for writ of certiorari should be denied, or the judgment below summarily affirmed, and this case returned to the Court of Appeals with an express order for the award of plaintiffs' costs and fees for opposing the appeal of the remand order.

Respectfully submitted,



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